

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MANOLO LEE TORRES,

Plaintiff,

v.

MATT STERMITZ, *et al.*,

Defendants.

3:17-cv-00578-MMD-VPC

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is Manolo Torres's ("plaintiff") application to proceed *in forma pauperis* (ECF No. 1) and his *pro se* complaint (ECF No. 1-1). Having reviewed the record, the court recommends that plaintiff's application to proceed *in forma pauperis* be granted, and that the complaint be dismissed as detailed below.

I. IN FORMA PAUPERIS APPLICATION

As set forth in 28 U.S.C. § 1915(a), the court may authorize a plaintiff to proceed *in forma pauperis* if he or she is unable to pay the prescribed court fees. The plaintiff need not "be absolutely destitute to enjoy the benefits of the statute." *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948). Based on plaintiff's application, the court finds that plaintiff is unable to pay the filing fee in this matter. (*See* ECF No. 1.) The court therefore recommends that plaintiff's application to proceed *in forma pauperis* be granted.

II. LEGAL STANDARD

Applications to proceed *in forma pauperis* are governed by 28 U.S.C. § 1915. Section 1915 provides, in relevant part, that "the court shall dismiss the case at any time if the court determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune

1 from such relief.” 28 U.S.C. § 1915(e)(2)(B) (2012). Dismissal of a complaint for failure to state
 2 a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure
 3 12(b)(6), and the court applies the same standard under section 1915 when reviewing the
 4 adequacy of a complaint. *See Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000).

5 Under Rule 12(b)(6), the court must dismiss the complaint if it fails to “state a claim for
 6 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Courts
 7 accept as true all well-pled factual allegations, set aside legal conclusions, and verify that the
 8 factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).
 9 Although the complaint need not contain detailed factual allegations, it must offer more than “a
 10 formulaic recitation of the elements of a cause of action” and “raise a right to relief above a
 11 speculative level.” *Twombly*, 550 U.S. at 555.

12 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom Ins.*
 13 *Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court takes particular
 14 care when reviewing the pleadings of a *pro se* party, for a more forgiving standard applies to
 15 litigants not represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Still, a
 16 liberal construction may not be used to supply an essential element of the claim not initially pled.
 17 *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is appropriate, a *pro se* plaintiff
 18 must be given some notice of the deficiencies of his or her complaint, and leave to amend, unless
 19 the opportunity to amend would be futile. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir.
 20 1995). Despite this leniency, a district court may in its discretion dismiss an *in forma pauperis*
 21 complaint if the claim “lacks an arguable basis in either law or fact.” *Id.* This includes claims
 22 based on untenable legal conclusions (e.g., claims against defendants who are immune from suit)
 23 or fanciful factual allegations. *See Franklin v. Murphy*, 745 F.2d 1221, 1228-29 (9th Cir. 1984).

24 III. DISCUSSION

25 A. Background

26 Plaintiff is a pretrial detainee currently incarcerated at Humboldt County Detention
 27 Center. (ECF No. 1-1 at 1.) Proceeding *pro se* and pursuant to 42 U.S.C. § 1983, plaintiff brings
 28 civil rights claims against Humboldt County Public Defender Matt Stermitz (“Stermitz”), City of

1 Winnemucca, Humboldt County, and Washoe County Crime Lab. (*Id.*) Plaintiff's allegations
2 arise from his state criminal prosecution for felony driving under the influence of alcohol ("DUI")
3 in the Justice Court of Union Township, County of Humboldt. (*Id.* at 3–6, 13.)

4 On July 13, 2017, plaintiff was involved in a traffic collision at an intersection in
5 Winnemucca, Nevada. (*Id.* at 15.) According to plaintiff, he lawfully yielded and proceeded
6 through the intersection, but a car "ran a stop sign on the north and ran into the right front of
7 [plaintiff's] car." (*Id.* at 3.) Winnemucca Police arrived and took statements from plaintiff, his
8 passenger, and the driver. (*Id.* at 3, 5.) Plaintiff was then arrested for felony DUI and
9 misdemeanor failure to yield. (*Id.* at 15–16.)

10 In Count I, plaintiff outlines a number of grievances against his public defender, Stermitz.
11 Plaintiff claims that Stermitz offered "no real answers" to plaintiff during their initial meeting,
12 refused to accept plaintiff's calls, "went on vacation," and did not engage in discovery. (*Id.*)
13 Stermitz also allegedly forged plaintiff's signature on a document waiving his right to a
14 preliminary hearing. (*Id.* at 4.) Plaintiff filed a police report regarding the forgery and appears to
15 take issue with Stermitz's continued representation of plaintiff. (*Id.*) Finally, plaintiff claims
16 that Stermitz violated his right to due process of law. (*Id.*)

17 In Count II, plaintiff describes several deficiencies in his arrest and criminal proceeding.
18 First, plaintiff states that "his first DUI was 9 years ago" and, without any elaboration, concludes
19 that his bail is set at an excessive amount — \$50,195. (*Id.* at 5.) Second, plaintiff contends that
20 Winnemucca Police erroneously reported "the accident site 6 blocks from where it happened."
21 (*Id.*) Third, plaintiff alleges that he never received his statement, his passenger's statement, nor
22 the other driver's statement regarding the traffic incident, and he never received records of the
23 "car camera and police camera," despite receiving "paper work" recording his receipt of these
24 documents. (*Id.* at 5, 20.) Fourth, plaintiff claims that he never waived his right to a preliminary
25 hearing or a speedy trial, but is "still sitting here in Humboldt County Jail 68 days later." (*Id.*)
26 Finally, plaintiff states that he received "part of [his requested] discovery 45 days after [he] was
27 arrested [but] never received the rest [and] never had [an] attorney client meeting." (*Id.*) Without
28

1 further explanation, plaintiff claims that his rights under the Eighth Amendment, Fourth
2 Amendment, Sixth Amendment, and Fourteenth Amendment were violated.

3 In Count III, plaintiff again complains that Stermitz violated his due process rights. (*Id.* at
4 6.) Stermitz ignored plaintiff's calls, denied plaintiff the opportunity to receive a preliminary
5 hearing, and refused to "consider anything but [plaintiff] being guilty." (*Id.*) Stermitz also
6 exhibited "anger" that made attorney-client communication impossible, and yet plaintiff has not
7 been appointed new defense council. (*Id.*) Plaintiff emphasizes that his involuntary waiver to the
8 preliminary hearing increased the appearance of his guilt and resulted in his insurance being held
9 liable for the collision despite plaintiff's lack of fault. (*Id.*)

10 Plaintiff requests that this court grant him the equitable relief of removing his criminal
11 proceeding to federal court. (*Id.* at 9.) Additionally, he seeks "restitution if [his] case is upheld,"
12 which the court can only interpret as a request for damages. (*Id.*) For the reasons discussed
13 below, the court dismisses plaintiff's claims for equitable relief without prejudice and stays his
14 claims for damages until such time that his criminal proceedings have concluded.

15 **B. Younger Abstention**

16 In upholding the principles of federalism, federal courts typically will not interfere in
17 ongoing state criminal proceedings absent extraordinary circumstances. *See Younger v. Harris*,
18 401 U.S. 37, 43–54 (1971); *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S.
19 423, 423 (1982) ("Minimal respect for the state processes, of course, precludes
20 any *presumption* that the state courts will not safeguard federal constitutional rights"). *Younger*
21 abstention is required if "(1) there are ongoing state judicial proceedings, (2) the proceedings
22 implicate important state interests, and (3) there is an adequate opportunity in the state
23 proceedings to raise federal questions." *Dubinka v. Judges of the Superior Court*, 23 F.3d 218,
24 223 (9th Cir. 1994). Where all three elements are met, the court must dismiss claims for
25 equitable relief because it lacks the discretion to grant such relief, *Beltran v. California*, 871 F.2d
26 777, 782 (9th Cir. 1988), and stay claims for damages until the resolution of the underlying
27 criminal proceeding. *Gilbertson v. Albright*, 381 F.3d 965, 968 (9th Cir. 2004).

1 Here, all three *Younger* factors are met, so the court must abstain from hearing plaintiff's
2 claims. First, it is evident that plaintiff is a pretrial detainee and that his state court criminal case
3 was ongoing at the time of filing. (See ECF No. 1-1 at 5, 9). The pendency of his criminal
4 prosecution is implied by his focus on pre-trial matters, such as discovery deficiencies and his
5 waiver of a preliminary hearing, as well as his direct request that his case "proceed to federal
6 court" (*Id.* at 3–6, 9.) Second, the criminal nature of the proceeding against plaintiff
7 implicates important state interests that justify abstention. *Sprint Communications, Inc. v. Jacobs*,
8 134 S. Ct. 584 (2013) (prosecuting criminal behavior is an important state interest).

9 Third, the state criminal proceeding provides plaintiff with ample opportunity to raise the
10 federal claims that appear in his complaint. Though not stated as such in the complaint,
11 plaintiff's numerous criticisms of Stermitz in Count I and III, and his request for this court to take
12 jurisdiction over his criminal proceeding, appear to be an attempt at securing new counsel.
13 *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (outlining Sixth Amendment right to
14 *effective* assistance of counsel). Plaintiff can raise any federal question he may have as to
15 Stermitz's competency by filing a motion for substitution of counsel, or its equivalent, depending
16 on the local rules of the particular state court handling plaintiff's criminal case. See, e.g.,
17 NEVADA RURAL JUSTICE COURT RULES, RULE 12 (2017). Should plaintiff be convicted, his
18 ineffective assistance of counsel claim would ripen and he may bring such claim on appeal or by
19 way of writ of habeas corpus. *Strickland*, 466 U.S. at 688; see *Dubinka*, 23 F.3d at
20 223 (acknowledging that state court proceedings still considered pending for abstention purposes
21 at conclusion of criminal trial and through appeal).

22 The court notes that plaintiff's allegation that Stermitz forged his signature on a
23 preliminary hearing waiver sounds in state criminal and tort law, but does not give rise to its own
24 constitutional or federal cause of action under § 1983. (ECF No. 1-1 at 4). Nor do plaintiff's
25 undirected discovery disputes in Count II impinge upon a constitutional or federal right. (*Id.* at
26 5.) To the extent that plaintiff's right to due process is implicated, he may vindicate this right by
27 motion to the state court under the applicable procedural rules of the court. See, e.g., NEVADA
28 JUSTICE COURT RULES OF CIVIL PROCEDURE, RULE 37(a) (2016). Similarly, plaintiff has an

1 adequate opportunity to move the state court to remedy his allegedly excessive bail. LOCAL
2 RULES OF PRACTICE FOR THE RURAL JUSTICE COURTS IN THE STATE OF NEVADA, RULE 9 (2016).
3 Finally, plaintiff's speedy trial claim may be raised on appeal or by habeas in the event that he is
4 convicted, and in any event it is not a basis for the court to intervene in his state criminal case.
5 *See Wright v. Volland*, 331 Fed. Appx. 496, 498 (9th Cir. 2009).

6 Because all three *Younger* factors are met, this court cannot award plaintiff's requested
7 equitable relief that the court intervene in his criminal case, nor is the court authorized to award
8 plaintiff's requested "restitution" at this juncture. (ECF No. 1-1 at 6.) The court recommends
9 that plaintiff's claim for equitable relief be dismissed without prejudice. The court further
10 interprets plaintiff's request for "restitution" as a claim for damages and recommends that this
11 claim be stayed pending his state criminal case. *Gilbertson*, 381 F.3d at 984; *Rhoden v. Mayberg*,
12 361 Fed. Appx. 895, 896 (9th Cir. 2010) ("district court properly dismissed ... claims for
13 declaratory and injunctive relief," but "claims for money damages should have been stayed until
14 the state court proceedings are completed").

15 IV. CONCLUSION

16 Consistent with the foregoing, the court finds that *Younger* abstention prevents this court
17 from granting plaintiff's requested relief. The court recommends that plaintiff's complaint be
18 dismissed with prejudice to the extent that it seeks equitable relief. However, the court
19 recommends that plaintiff's action be stayed to the extent that it seeks damages.

20 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
21 Practice, the parties may file specific written objections to this Report and Recommendation
22 within fourteen days of receipt. These objections should be entitled "Objections to Magistrate
23 Judge's Report and Recommendation" and should be accompanied by points and authorities for
24 consideration by the District Court.

25 2. This Report and Recommendation is not an appealable order and any notice of
26 appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's
27 judgment.
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V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that plaintiff's application to proceed *in forma pauperis* (ECF No. 1) be **GRANTED**;

IT IS FURTHER RECOMMENDED that the Clerk **FILE** plaintiff's complaint (ECF No. 1-1);

IT IS FURTHER RECOMMENDED that the complaint be **DISMISSED WITHOUT PREJUDICE** to the extent that it seeks equitable relief.

IT IS FURTHER RECOMMENDED that the District Court issue an order staying this action, to the extent it seeks damages, until the related state criminal case is no longer pending;

IT IS FURTHER RECOMMENDED that the clerk administratively close this case;

IT IS FURTHER RECOMMENDED that plaintiff, if he wishes to continue with this case after the disposition of the criminal charges against him, must file a request that the stay be lifted and the case be re-opened within sixty (60) days of the final disposition of the criminal charges (including all appeals).

DATED: March 7, 2018.


UNITED STATES MAGISTRATE JUDGE